

Commission's settled standards for character qualifications, Liberty can be counted upon to comply with Commission rules and regulations in the future.⁵⁹

27. Unable to rebut the evidence of Liberty's truthfulness before the Commission and Liberty's reliability to abide by the Commission's rules prospectively—two essential factors in evaluating a licensee's character qualifications⁶⁰—Time Warner resorts to recounting a number of alleged factual inconsistencies regarding Liberty's 1995 Surreply and the testimony of Messrs. Barr and Nourain.⁶¹ As detailed above and in the Bureau's pleading, Liberty has explained all of these purported variances in the record. Moreover, alleged discrepancies do not rise to the level of misrepresentations or lack of candor merely by Time Warner's repeated assertion that they do. To the contrary, Commission precedent makes it abundantly clear that deceptive intent is necessary for such a finding,⁶² and there is simply no evidence to show that either Mr. Barr's post-hearing clarification or Mr. Nourain's allegedly inconsistent statements were made with any intent to deceive the Commission. Accordingly, Time Warner presents no basis to support its conclusion that Liberty has engaged in misrepresentation or lack of candor.

⁵⁹ See Bureau Proposed Findings, ¶ 103.

⁶⁰ See *Character Policy Statement*, 102 FCC 2d 1179, 1188-90 (1986).

⁶¹ Time Warner Supp. Proposed Findings, ¶¶ 89-106.

⁶² *Supra*, n.55.

B. Time Warner's Discussions of Liberty's Reliance on Counsel and Its Appropriate Sanction Wrongly Presume Misconduct

28. Time Warner's reliance-on-counsel argument is predicated on facts that were simply never adduced at the re-opened hearing. For example, Time Warner states: "Mr. Price, the president of the company, was warned by the company's regulatory counsel of the possibility of premature microwave operations as early as April 1993."⁶³ This conclusion was specifically contradicted under oath, however, not only by Mr. Price, but also by Ms. Richter, the author of the putative warning and, as the Bureau pointed out, "a highly credible witness."⁶⁴

29. More fundamentally, Time Warner is attempting to undermine a reliance-on-counsel argument that Liberty has never made. Time Warner suggests that Liberty is attempting to absolve itself by arguing that it was simply following the advice of its counsel.⁶⁵ Unlike the facts of most reliance cases, Liberty's missteps did not result from affirmatively relying on legal advice that recommended an incorrect or illegal course of action. Rather than following any particular advice of their licensing counsel, Liberty's principals depended on their licensing counsel to ensure that Liberty acquired the requisite authority for its paths through the orderly processing of license applications. Although Liberty's dependence does not excuse its actions, it contradicts Time Warner's assertions that Liberty was "on notice" regarding the unauthorized paths and ignored the

⁶³ Time Warner Supp. Proposed Findings, ¶ 107.

⁶⁴ *See supra*, ¶¶ 1-7; Bureau Supp. Proposed Findings, ¶ 26.

⁶⁵ Time Warner Supp. Proposed Findings, ¶ 107.

notice. Accordingly, Time Warner has wholly failed to show that Liberty engaged in knowing violations.

30. Just as insubstantial is Time Warner's argument that Liberty deserves denial of its applications as well as forfeiture.⁶⁶ Without pointing to any evidence that Liberty at any time intended to deceive the Commission, Time Warner moves directly to what punishment Liberty merits. By simply presuming Liberty's lack of candor and misrepresentation, Time Warner is attempting to distract attention from the fact that there is no basis in the record for such a sanction.

31. Moreover, Time Warner's discussion of sanctions is plagued by a pervasive misreading of case law. Time Warner cites a number of cases relied upon by Liberty and the Bureau in support of the Joint Motion for Summary Decision to buttress the argument that Liberty should pay a substantial forfeiture and lose its licenses.⁶⁷ None of the cases cited bolsters Time Warner's position because—like Liberty—the parties, in each of these cases, did not act with the requisite deceptive intent:

Abacus Broadcasting Corp.

Although Abacus is not disqualified from holding a Commission license in light of our conclusion that it did not intentionally try to deceive the Commission, its failure to provide complete information about the status of the Promontory Point site violated section 1.17 of the Commission's rules. Thus, we conclude that Abacus should be assessed a forfeiture of five thousand dollars.⁶⁸

⁶⁶ *Id.*, ¶¶ 114-23.

⁶⁷ *Id.*, ¶¶ 120-21; Joint Motion for Summary Decision, ¶¶ 101, 103, 105, 107-09, 112-14.

⁶⁸ 8 FCC Rcd 5110, 5114-15 (Rev. Bd. 1993) (citation omitted).

MCI Telecommunications Corp.

[W]e do not believe it is appropriate to initiate revocation proceedings in this case. . . . We note, in this regard, that we find no evidence of misrepresentation or lack of candor on MCI's part or any intention to violate our Rules or the Communications Act.⁶⁹

David A. Bayer

CyberTel's use of plastic reflectors constitutes very serious misconduct which was recent, intentional on the part of the employees involved, and inherently deceptive. . . . The record indicates that Cyber[T]el's owners and senior managers were not involved in the misconduct [CyberTel's] corrective and remedial actions constitute mitigating factors that we believe warrant invoking a substantial forfeiture rather than revocation.⁷⁰

32. Time Warner also fails to note that *David A. Bayer* undermines its assertion that "where employees . . . are inadequately supervised such that the Commission's rules and policies are violated, revocation or denial of a license is warranted."⁷¹ Moreover, the above-cited cases make clear that mere negligence, such as negligent supervision, is not a sufficient cause to disqualify an applicant. Also, as stated above in *Bayer*, the Commission considered the senior managers' lack of knowledge to be a mitigating factor in determining that forfeiture, not revocation, was the appropriate punishment. Similarly, nothing in this re-opened hearing suggests that Liberty's

⁶⁹ 3 FCC Rcd 509, 514 (1988) (citation omitted).

⁷⁰ 7 FCC Rcd 5054, 5056 (1992).

⁷¹ Time Warner Supp. Proposed Findings, ¶ 122. Time Warner attempts to support this declaration with a selective quotation from *Patterson Shrimp Co., Inc.*, 29 FCC 1049, 1052 (1960). Time Warner fails to mention, however, that the Commission in that case revoked a party's licenses because, in addition to not adequately supervising its employees, the party's violations were found to be willful, repeated, and a potential danger to life and property. *Id.* Clearly, none of these factors exist in the instant proceeding.

principals knew of the unauthorized paths before April 1995. Without evidence of such knowledge, Time Warner cannot sustain the conclusion that Liberty's violations were intentional or that Liberty possessed deceptive intent, the *sine qua non* for lack of candor and misrepresentation. As settled Commission precedent makes clear, the denial of Liberty's licenses is unwarranted under these circumstances.

C. Time Warner's Adverse Inference Argument Is Unfounded

33. Time Warner's argument that an adverse inference can be drawn from Liberty's failure to produce the Internal Report is legally incorrect.⁷² Despite its law review-like survey of adverse inference law, Time Warner never acknowledges the well-settled principle that an adverse inference may not be imputed to a party that withholds information through the proper exercise of the attorney-client and work product privileges. For example, the Fourth Circuit has unequivocally stated:

The [attorney-client] privilege was created to protect the right to effective counsel. . . . To protect that interest, a client asserting the privilege should not face a negative inference about the substance of the information sought.⁷³

Likewise, the D.C. Circuit also disfavors the practice of drawing an adverse inference in such circumstances:

⁷² Time Warner could have raised the issue of drawing an adverse inference in any of its numerous pleadings that preceded this one, but it did not do so. The Presiding Judge should not countenance this meritless twelfth-hour argument.

⁷³ *Parker v. Prudential Ins. Co.*, 900 F.2d 772, 775 (4th Cir. 1990); *see also THK America, Inc. v. NSK, Ltd.*, 917 F. Supp. 563, 566-67 (E.D. Ill. 1996) ("Disallowing adverse inferences is a logical extension of the attorney-client privilege since allowing a negative inference would in many cases oblige the client to produce the privileged materials.").

We are dubious that an adverse inference can be drawn from a fully justified assertion of a privilege. The imposition of such a burden on those who invoke a privilege may discourage its exercise and thereby undermine the policies it was designed to serve.⁷⁴

Consequently, Time Warner may not use the adverse inference rule to overcome Liberty's assertion of its privileges in this proceeding.⁷⁵

34. In any event, no adverse inference needs to be drawn because, as the Bureau and Liberty have already shown, the Report is unnecessary for the Presiding Judge to render a decision in this proceeding. As Liberty's Proposed Findings of Fact and Conclusions of Law make clear, the parties in this proceeding have had a full and untrammelled opportunity to investigate the facts of this case, consistent with the boundaries of relevance and privilege, in an exhaustive discovery process.⁷⁶ Nothing in the Administrative Procedure Act mandates otherwise; that Act however, unambiguously requires the Presiding Judge to make decisions based solely on the proceeding's record evidence.⁷⁷ Moreover, at no time in this proceeding has Liberty ever relied upon — nor

⁷⁴ *Black v. Sheraton Corp.*, 564 F.2d 550, 556 (D.C. Cir. 1977) (footnote omitted).

⁷⁵ Liberty has exercised its privileges to withhold this document throughout these proceedings in accordance with the Commission's own rules. 47 C.F.R. § 0.459. Although a panel of the Court of Appeals for the District of Columbia Circuit did deny Liberty's request to keep the Report confidential, *see Bartholdi Cable Co., Inc. v. FCC*, No. 96-1030, slip op. (D.C. Cir. June 3, 1997), Liberty intends to file a motion for rehearing with the court within the time frame allowed by the D.C. Circuit and in accordance with the Federal Rules of Appellate Procedure. In the meantime, the Report remains subject to a judicial stay. An adverse inference should not be drawn from Liberty's exercise of its appeal rights. To do so would discourage the exercise of lawful privileges.

⁷⁶ Liberty Proposed Findings, ¶¶ 71-72.

⁷⁷ *Id.*

will Liberty rely upon — the Report to make either factual showings or legal arguments.
The record is thus now complete and the case ripe for a decision.

CONCLUSION

For the foregoing reasons, Liberty respectfully requests that the Presiding Judge adopt the Bureau's and Liberty's Proposed Findings of Fact and Conclusions of Law, as supplemented, and grant the Joint Motion for Summary Decision, in its entirety, in favor of Liberty and the Bureau.

Respectfully submitted,

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CERTIFICATE OF SERVICE


I, Vipul N. Nishawala, hereby certify that on this 23rd day of June 1997, I caused copies of the foregoing Bartholdi Cable Company, Inc.'s Reply to Proposed Findings of Fact and Conclusions of Law of Time Warner Cable of New York City and Paragon Communications by hand delivery to the following parties:

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